No. 78-1878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE SEBRING UTILITIES COMMISSION, THE FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER & SEWER UTILITIES, AND THE CITIES OF HOMESTEAD, KISSIMMEE, LAKELAND, STARKE AND TALLAHASSEE, FLORIDA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT AMOCO PRODUCTION COMPANY IN OPPOSITION TO PETITION

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Amoco Production Company (Amoco), an intervenor in support of respondent Federal Energy Regulatory Commission (Commission) below and a respondent here, submits this brief in opposition to the Petition for Writ of

Certiorari to review the judgment entered in this case on March 20, 1979.

COUNTERSTATEMENT OF THE CASE

This case involves review of Commission orders disclaiming jurisdiction to order an interstate pipeline to "curtail" and "reallocate" to others natural gas volumes to which the pipeline has no legal title, but is merely transporting for the owner thereof. Brief reference must thus be made to the context in which the specific orders were issued as well as to clarify Amoco's involvement in this case:

1. Amoco's Sale to FP&L and Transportation by FGT on Behalf of FP&L.

Florida Power & Light Company (FP&L) is an electric generating, transmission and distribution company, operating entirely within the State of Florida, which purchases natural gas directly from producers in Texas and Louisiana (R. 306C).[1]

Florida Gas Transmission Company (FGT) operates a major interstate natural gas pipeline which originates in Texas, traverses the coast of the Gulf of Mexico eastward, and terminates near Miami, Florida. In addition to purchasing natural gas for resale by it, FGT also transports to the State of Florida the gas purchased in the field by two major electric generating companies which operate in Florida, FP&L and Florida Power Corporation (FP). These transportation volumes increase FGT's load requirements and allow it to operate more efficiently (Appendix A, p. A-7).[2]

[1] Suffix "C" denotes the record page certified by the Commission in the *Sebring Utilities Commission* v. *Federal Energy Regulatory Commission*, 5th Circuit No. 77-2972 (Involves review of certain FERC orders in Docket No. CP77-147.)

[2] References with the prefix "A" denote pages in Petition for Writ of Certiorari or attached appendices.

On March 12, 1965, Amoco, formerly Pan American Petroleum Corporation, contracted to sell to FP&L up to 200,000 MMBTUs of natural gas per day for twenty years.[3] This contract is a warranty-type contract under which no specific fields, leases or sources of supply are dedicated or committed to the performance of the contract (R. 205C).

Amoco's sale to FP&L is a direct sale not subject to the Commission's[4] jurisdiction under Section 1(b) of the Natural Gas Act (Act)[5] (R. 290C and 306C). However, FGT's transportation of this gas for FP&L is subject to the Commission's jurisdiction. Accordingly, FGT filed a certificate application on June 9, 1965, in Docket No. CP65-393 for authorization to construct and operate additional pipeline facilities and to transport FP&L's gas (R. 376C). Title to the gas transported for FP&L was never vested in FGT (R. 2262L and 2268L),[6] and FGT warranted that its transportation of FP&L gas would not in any way encumber FP&L's title (R. 150C).

After a hearing on FGT's application the Commission on March 1, 1967, issued an opinion and order in Docket No. CP65-393 certificating the requested transportation service. *Florida Gas Transmission Company*, 37 FPC 424 (Opinion No. 516) (1967), (R. 289C, 290C, 2268L).

[3] Austral Oil Company was also a party-seller under this contract and the Commission recognized that other sellers might be added in the future. The corporate warranty under the contract, however, is that of Amoco alone.

[4] The term "the Commission" refers to the predecessor agency, the Federal Power Commission, as well as the Federal Energy Regulatory Commission.

[5] 15 U.S.C. § 717(b).

[6] Suffix "L" denotes the record page certified by the Commission in the *Sebring Utilities Commission* v. *Federal Energy Regulatory Commission*, 5th Circuit No. 77-2911 (Involves review of certain FERC orders in Docket No. RP75-79). On March 20, 1978, the Fifth Circuit ordered this case consolidated with No. 77-2972.

The Commission specifically stated, "The principal and overriding issue in this case is whether the sales by the producers, Pan Am and Austral, are jurisdictional. We hold they are not." Id. at 427-431.

Subsequently, all parties agreed to a stipulation and agreement whereby the Amoco-FP&L contract was modified to reduce the total warranty amount and to provide that after 15 years from the date of initial deliveries, the "warranty" would be deleted and Amoco would be obligated for five years to deliver to FP&L the production from those wells then delivering gas to FP&L. FGT filed this settlement with the Commission for its approval. On May 29, 1967, the Commission issued an order approving the settlement agreement and amending its March 1, 1967 opinion in accordance with this settlement. *Florida Gas Transmission Company*, 37 FPC 993 (1967). Transportation of FP&L's gas by FGT is in accordance with this certificate issued by the Commission.

2. Commission Orders Issued in Docket No. CP77-147 (Fifth Circuit No. 77-2972).

On January 18, 1977, the Ft. Pierce Utility Authority of the City of Ft. Pierce, *et al.* (Florida Cities) filed with the Commission pursuant to Section 1.6 of the Commission's Rules of Practice and Procedure,[7] in Docket No. CP77-147, a petition and complaint seeking "curtailment" and "reallocation" of the gas FGT transported for FP&L under the certificate issued in Docket No. CP65-393 (R. 168-271C). Amoco filed a response on March 30, 1977, denying Florida Cities' contention that the Commission could order curtailment of gas *not owned* by FGT (R. 287-290C).

---

[7] *Ft. Pierce Utility Authority* v. *Federal Power Commission*, 526 F.2d 993,999 (5th Cir. 1976).

On August 3, 1977, the Commission issued an order in Docket No. CP77-147 dismissing Florida Cities' petition and complaint stating:

> "However, we do not concur with Cities in curtailing the T-gas under any of the contracts because such gas is *not owned* by Florida Gas and does not form a part of the system's gas supply from which gas can be allocated to its various customers.
>
> "Although the transportation gas flows through Florida Gas' pipeline, it already has been purchased by FPL and Florida Power prior to its transportation by Florida Gas to points of destination in Florida. Since legal title to the gas has vested in the two power companies prior to its interstate transportation, we do not believe that the *Louisiana Power and Light* and *LoVaca Gathering Company* cases are applicable herein for purposes of Cities' request." (Appendix C-4, p. A-92, emphasis added).

In an order denying rehearing of its August 3rd order, the Commission on September 30, 1977, reiterated its position that the gas being transported for FP&L is not owned by FGT, and, therefore, is not subject to FGT's system-wide curtailment as is the gas FGT owns and delivers to its direct and resale customers (Appendix C-5, pp. A-95 - A-100).

3. Commission Orders Issued in Docket No. RP75-79 (Fifth Circuit No. 77-2911).

In Opinion No. 807, issued June 24, 1977, in Docket No. RP75-79, the Commission found that the "place of transportation gas" should be considered in the hearings on FGT's new curtailment plan. Accordingly, FP&L and FP were joined as parties (Appendix C-1, p. A-62).

However, on rehearing, the Commission issued Opinion No. 807-A on September 22, 1977, revoking the joinder of FP&L and FP and excluding the transportation gas

from the curtailment proceedings in Docket No. RP75-79. This order adopts and affirms the rationale of the Commission's August 3, 1977 order in Docket No. CP77-147, which refused to order curtailment of transportation gas "because such gas is not owned by FGT and does not form a part of the system's gas supply from which gas can be allocated to its various customers." (Appendix C-2, p. A-74). This holding was again affirmed in the Commission's "Order Denying Rehearing," issued November 21. 1977, in Docket No. RP75-79 (Appendix C-3, pp. A-81 - A-86).

4. The Court of Appeals Decision.

The Fifth Circuit's decision affirmed the Commission's position and policies enunciated in the various orders on review (Appendix A, pp. A-1 - A-35).

First, FGT's curtailment plan was deemed unduly discriminatory, in that it granted a preference, without a reasonable basis for distinction, to indirect industrial customers over direct industrial customers. In arriving at this decision, the Fifth Circuit recognized "the Commission's duty to protect the public interest in the allocation of scarce supplies of natural gas" (p. A-20) and gave complete recognition to the Commission's curtailment jurisdiction over sales to direct and indirect customers. *Federal Power Commission* v. *Louisiana Power and Light Company*, 406 U.S. 621 (1972). To the extent that a discriminatory curtailment plan is rooted in customer contracts, "the Commission is not bound by agreements among parties *subject to its jurisdiction.*" *American Smelting & Refining Co.* v. *Federal Power Commission*, 494 F.2d 925, 934 (D.C. Cir. 1974), *cert. denied sub nom., City of Willcox* v. *Federal Power Commission*, 419 U.S. 882 (1974) (emphasis added) (p. A-17).

Secondly, the Fifth Circuit found that when the Commission finds a pipeline's curtailment plan to be unduly

discriminatory, Section 5 of the Act does not require the Commission to fashion immediate interim relief.[8]

Finally, in accordance with the Act and prior case law, the Fifth Circuit affirmed the Commission orders on review denying curtailment jurisdiction over gas transported but not owned by FGT. The Court found that legal title to this gas passed from the producers to FP and/or FP&L prior to its delivery to FGT for transportation to Florida, and held (p. A-12):

> "FGT stands in the position of a bailee in relation to FP and FP&L. We think that the Commission correctly determined that because FGT never owned the gas, it could not be compelled to allocate it to others. The transportation gas has never been a part of the supply to FGT for satisfaction of its sales contracts. We see no authority for making it so now." (p. A-34).

The Petition for Writ of Certiorari seeks review of only the Fifth Circuit's decision on this final issue.[9]

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[8] 15 U.S.C. § 717d.

[9] Petitioners also allude to a "secret arrangement" between Amoco and FGT in their footnote 10 on page A-9 of the Petition. The matters discussed therein are the subject of a separate Commission investigation in Commission Docket No. IN78-2. The subject matter of the investigation and the investigation proceeding are immaterial and irrelevant to this case, which accords with the manner in which the Commission and the Fifth Circuit treated these separate matters.

ARGUMENT

The Petition does not set forth questions, grounds, or reasons requiring or warranting review by this Court.

I. THE FIFTH CIRCUIT'S RULING ON THE TRANSPORTATION GAS ISSUE IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT; THEREFORE, CERTIORARI SHOULD BE DENIED.

In affirming Commission orders which denied "curtailment" jurisdiction over gas transported by but not owned by FGT, the Fifth Circuit's decision is totally consistent with the Natural Gas Act and federal court decisions, including the three opinions of this Court relied upon by Petitioners.[10]

Petitioners first cite *Federal Power Commission* v. *Louisiana Power & Light Company, supra,* as support for their contention that the Commission has curtailment jurisdiction under Section 1(b) of the Natural Gas Act over gas not owned by FGT. However, that case involved only the curtailment of direct sale gas owned by the pipeline, not gas owned by others and which is only transported by the pipeline. The issue of ownership of such transported gas was never raised or even alluded to in *Louisiana Power* because all the gas involved was initially owned by the pipeline. The pipeline transported and sold this gas to direct and resale customers and such gas is subject to curtailment allocations. However, in this case, the issue is not whether the Commission has authority to so curtail a pipeline's own gas, but whether the Commission can reallocate gas which does

[10] *Federal Power Commission* v. *Louisiana Power & Light Company,* 406 U.S. 621 (1972); *California* v. *Southland Royalty Company,* 436 U.S. 519 (1978); and, *California* v. *Lo-Vaca Gathering Company,* 379 U.S. 366 (1965).

not belong to the pipeline, but which belongs to a utility company and is only transported by the pipeline. Thus, there is no conflict between the holding below and *Louisiana Power.*

Petitioners next allege that the Commission's failure to exercise "curtailment" jurisdiction over the gas transported by FGT creates regulatory gaps in the administration of the Act (p. A-15).

However, in granting FGT authorization to transport gas for FP&L, the Commission specifically referred to this "gap" question and decided none existed. 37 FPC 432-442. The Commission's regulatory control over FGT's transportation rate and its authority to condition the original certificate were deemed sufficient to protect the public interest. FP&L thus could not receive any of the gas it purchased from Amoco until the Commission was satisfied in 1967 that the transportation service by FGT was in the public interest.

Petitioners' reading of *California* v. *Southland Royalty Company, supra,* also misinterprets this Court's holding. In *Southland Royalty,* this Court held that once gas had been dedicated to a jurisdictional sale in interstate commerce, the regulatory status of the gas changed, and there could be no abandonment of interstate service until Commission authorization was obtained, regardless of whether the party dedicating the gas had continuing title to it. In that case the producer had dedicated the gas from certain leases to a jurisdictional sale in interstate commerce by selling it to an interstate pipeline under a certificate of unlimited duration. This Court stated:

> "This issuance of a *certificate* of *unlimited duration* covering the gas at issue here created a federal obligation to serve the interstate market until abandonment authorization had been obtained.
>
> * * * *

> "But gas which is '*dedicated*' pursuant to the Natural Gas Act is not surrendered to the public; it is simply placed within the jurisdiction of the Commission so that it may be *sold* to the public at the 'just and reasonable' rates specified by § 4(a) of the Act." 436 U.S. at 526-527 (emphasis added).

The present case is clearly distinguishable from *Southland Royalty* since the gas Amoco sells directly to FP&L for FP&L's consumption has never been dedicated to a jurisdictional sale for resale in the interstate market and, therefore, such gas never has been subject to Section 4 (a) or Section 7 of the Act. The Amoco sale to FP&L is a non-jurisdictional sale for which a certificate of public convenience and necessity has not been and is not required of either Amoco or FP&L. Consequently, the Fifth Circuit correctly held *Southland* to be inapplicable to this case (p. A-34).

The "commingling doctrine" developed in *California* v. *Lo-Vaca Gathering Company*, *supra*, also is not applicable to this case. This Court recognized that doctrine was not all-inclusive, stating that whether "in spite of original commingling there might be a separate so-called non-jurisdictional transaction of a precise amount of gas not-for-resale within the meaning of the Act is a question we need not reach." 379 U.S. at 370 (citations omitted). This Court in *Lo-Vaca* thus did not reach a decision involving the Commission's jurisdiction over gas *not* owned by a pipeline. As the Third Circuit subsequently ruled, *Lo-Vaca* is inapplicable to gas transported but not owned by an interstate pipeline because of the absence of a jurisdictional sale. *Public Service Electric and Gas Company* v. *Federal Power Commission*, 371 F.2d 1, 5 (3rd Cir. 1967), *cert. denied*, 389 U.S. 849 (1967). Thus, there is no basis for Petitioners' contention that the transportation gas in this case should be treated like the compression gas owned by the pipeline

in *Lo-Vaca* (p. A-18), and the decision below does not conflict with *Lo-Vaca*.

II. CERTIORARI IS NOT WARRANTED IN VIEW OF THE SETTLED NATURE OF THIS ISSUE.

The principle that a pipeline cannot "curtail" gas it transports but does not own has been repeatedly recognized by the Commission and the federal courts. The Commission's ability to efficiently administer the Natural Gas Act is dependent upon such consistent interpretations of the duties and obligations imposed upon producers, pipelines, and consumers pursuant to various provisions of the Act. What Petitioners recommend would create utter chaos in the natural gas industry.

Pipeline *ownership* of gas has been and must be the determining factor in deciding what gas a pipeline may lawfully curtail or allocate. Therefore, as the courts hold, the Commission is without jurisdiction to order the curtailment of gas transported but not owned by an interstate pipeline. Thus, in a recent case involving a review of the Commission's policy of allowing pipelines to transport gas owned by end-users who were suffering curtailment of gas volumes needed for high priority uses,[11] the District of Columbia Circuit held these transported volumes were not subject to pipeline curtailment. *American Public Gas Association, et al.* v. *Federal Energy Regulatory Commission*, 587 F.2d 1089 (D.C. Cir. 1978).

> "[T]he purpose of a curtailment plan is to prescribe the manner in which a pipeline that cannot meet its contractual commitments will curtail deliveries of its *own* gas." 587 F.2d at 1098.

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[11] *Policy with Respect to Certification of Pipeline Transportation Agreements*, Docket No. RM75-25, (Order No. 533, August 28, 1975).

This ruling is buttressed by other Commission and court decisions over the past fourteen years, and the holding below is consistent.[12]

Petitioners also assume that, "if the decision below is affirmed, potentially vast amounts of natural gas will be exempted from regulation." (p. A-19). This is not correct, as the Commission has authority to grant or deny an application to transport gas for others. See, *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1965). Under Section 7(e) of the Act, the Commission also may attach "such reasonable terms and conditions as the public convenience and necessity may require." The Commission can and has attached various types of conditions to transportation certificates, *e.g.* source of gas, end-use of gas, price, and duration of certificate.

Section 608 of the Public Utility Regulatory Policies Act of 1978[13] adds Section 7(c)(2) to the Natural Gas Act to specifically provide for the transportation of gas not owned by a pipeline.

> "The provision is intended to remove any uncertainty which may exist regarding the basis for present Federal Energy Regulatory Commission policy regarding the transportation of user-owned natural gas by interstate pipelines. However, the conference substitute is not intended to require the Commission to issue a certificate of public convenience and necessity in any specific case. The question of whether to issue a certificate is left to the Commission based upon its determination of whether the transportation of the gas will serve the public convenience and necessity. In addition, limitations are not imposed on the exercise of this authority by the Commission other than the public convenience and necessity standard which is generally applicable to certification by the Commission of natural gas transportation." *Public Utility Regulatory Policies Act of 1978*, H.R.Rep. No. 95-1750, 95th Cong., 2nd Session 119 (1978).

It thus would be contrary to prior Commission and judicial construction of the Act, as well as the intent of Congress, to hold that the Commission may order the curtailment of gas transported but not owned by a pipeline.

III. ALL RELEVANT FACTORS WERE CONSIDERED BY THE COMMISSION AND BY THE FIFTH CIRCUIT.

Petitioners' argument that this Court should consider the "practical consequences" of the Fifth Circuit's decision is without merit. The Commission previously considered all relevant factors, including the question of substantial evidence, before ruling FP&L's gas could not be included in FGT's curtailment plan. Despite Petitioners' disclaimers to the contrary, ownership of gas is an important distinction in the administration of the Act. As to natural gas not owned by FGT, the Commission lacks jurisdiction to order its curtailment and reallocation among FGT's customers according to end-uses. Upon consideration of all the circumstances, including the issues mentioned by Petitioners, the Commission correctly concluded, and the Fifth Circuit correctly affirmed, that

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[12] *Transcontinental Gas Pipe Line Corporation*, 33 FPC 237 (1965), *aff'd sub nom. Public Service Electric Gas Company* v. *Federal Power Commission*, 371 F.2d 1 (3rd Cir. 1967), *cert. denied*, 389 U.S. 849 (1967); *Transcontinental Gas Pipe Line Corporation*, Docket No. RP72-99 (Opinion No. 778-A, December 8, 1976); *Policy With Respect To Certification of Pipeline Transportation Agreements*, Docket No. RM75-25 (Order No. 2, February 1, 1978); *Certification of Pipeline Transportation for Certain High Priority Uses*, Docket No. RM79-18 (Order No. 27, April 23, 1979); and, *Transportation Certificates for Natural Gas For the Displacement of Fuel Oil*, Docket No. RM79-34 (Order No. 30, May 14, 1979).

[13] 16 U.S.C. § 2601 *et seq.*

gas ownership is the controlling factor in deciding what natural gas volumes are subject to pipeline curtailment.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

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